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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LAVERNE JONES, Plaintiff and Appellant, v. ELVIS JONES et al., Defendants and Respondents.	A106224 (Alameda County Super. Ct. No. RG03-089704, consolidated with No. C-650699)
In re the Marriage of LAVERNE JONES and ELVIS JONES.	
LAVERNE JONES, Appellant, v. ELVIS JONES, Respondent.	(Alameda County Super. Ct. No. C-650699, consolidated with No. RG03-089704)

Introduction

Plaintiff LaVerne N. Jones (LaVerne) appeals in propria persona from an order of the Alameda County Superior Court sustaining the demurrer of defendants Elvis L. Jones (Elvis) and Wanda E. Jones (Wanda) to her second amended complaint without leave to amend.[1] The trial court granted the defendants' demurrer on the grounds that all causes of action were barred by applicable statutes of limitation.

[1] Although the February 4, 2004 order LaVerne attempts to appeal from was not a final judgment at the time of the appeal, we take judicial notice upon our own motion that a judgment of dismissal in this action (Alameda County Super. Ct. No. C-650699,

Procedural Background

LaVerne and Elvis Jones were married in 1981, and judgment of dissolution of their marriage was entered on March 21, 1990, in Alameda County Superior Court case No. C-650699.

On April 2, 2003, LaVerne filed a complaint for fraud against her ex-husband and his new wife, Elvis and Wanda, in Alameda County Superior Court case No. RG03-089704. Following hearing, on July 1, 2003, a demurrer was sustained with leave to amend. The court directed LaVerne's attention to Code of Civil Procedure section 425.10, subdivision (a)(1),[2] requiring a complaint to "contain '[a]statement of facts constituting the cause of action, *in ordinary and concise language.*' (Emphasis added)." On July 21, 2003, LaVerne filed her first amended complaint.

On August 5, 2003, LaVerne moved to reopen the dissolution proceedings by seeking an order to show cause to set aside the interlocutory judgment and modify spousal support in case No. C-650699.

On September 12, 2003, the court sustained the demurrer to the first amended complaint with leave to amend. The court, in its order, pointed out that its previous order sustaining the demurrer to the original complaint "contained specific directives as to the proper drafting of complaints. The First Amended Complaint was not drafted in conformity with that Order . . . and applicable rules of California pleadings." (LaVerne has not included copies of the original or first amended complaint in her appellant's appendix on appeal.)

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consolidated with No. RG03-089704) was entered by the court on December 10, 2004, nunc pro tunc as of February 4, 2004. (Evid. Code, §§ 451, subd. (a), 452, subd. (d).) We therefore treat this appeal as properly from the judgment of dismissal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2004) ¶¶ 2:237, 2:262-2:263, pp. 2-103, 2-120 to 2-122.)

[2] All statutory references are to the Code of Civil Procedure, unless otherwise specified.

Following a failed attempt at settlement, LaVerne filed the instant second amended verified complaint in case No. RG03-089704 on December 4, 2003. The Alameda County Superior Court dockets for both cases reflect that this second amended complaint (and all subsequent pleadings) were docketed as filed in case No. C-650699. The court ordered both actions consolidated before Judge Tiger, sitting in Family Court, on January 13, 2004.

Elvis and Wanda filed a demurrer and motion to strike the second amended complaint. On February 4, 2004, after hearing, the trial court sustained the demurrer without leave as to amend to all causes of action in the second amended complaint on grounds that they were barred by applicable statutes of limitation. The court overruled as moot Elvis and Wanda's additional demurrer to various causes of action on the ground they failed to state facts sufficient to constitute causes of action.

LaVerne filed a notice of appeal from the court's order of February 4, 2004 sustaining the demurrer, and later sought to have the trial court enter judgment dismissing the action. After initially denying that request, on December 10, 2004, the trial court entered a judgment of dismissal in the case, nunc pro tunc to February 4, 2004.

Factual Allegations

"On appeal from dismissal following a sustained demurrer, we take as true all well-pleaded factual allegations of the complaint." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 495-496; accord, *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1291.) Further, we accept as true all facts that may be implied or inferred from those [plaintiff] expressly alleges. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray,* at p. 1291; *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 266.)

So far as we can discern from the discursive and confusing second amended complaint (including exhibits), LaVerne alleged therein in relevant part as follows:

Laverne and Elvis were married on June 16, 1981. In 1984, LaVerne and Elvis acquired a residence at 10320 Shaw Street in Oakland, California. The grant deed transferred the property to Elvis and LaVerne "husband and wife, as Joint Tenants."

LaVerne alleges the property was then, and at all subsequent times has been, held as community property. Sometime before and in connection with dissolution of the marriage on March 21, 1990, the parties entered into a Marital Settlement Agreement, which provided in relevant part as follows:

"IV.

"FAMILY RESIDENCE:

"A. Parties agree that they shall refinance their debt obligation on the family residence located at 10320 Shaw Street, Oakland, CA. Said proceeds will be distributed as follows: $47,000.00 to holder of first mortgage, $8,000.00 to LaVerne Jones, and $1,200.00 to Elvis Jones. The parties agree that Elvis Jones will pay the monthly mortgage payments of $725.00 as his sole obligation. The parties agree that Elvis Jones will be the sole occupant of the subject premises with no right of occupancy by LaVerne Jones. On sale of the property, the parties agree that LaVerne Jones shall be entitled to one-half the equity minus the sum of $8,000.00."

Neither the subject property nor the Marital Settlement Agreement were referred to in the dissolution decree.

LaVerne alleges that she and Elvis continue to have a confidential, cofiduciary relationship and statutory obligations as specified in Family Code section 721. Elvis began dating Wanda while LaVerne was still married to him. Contrary to the terms of the Marital Settlement Agreement, that Elvis would be the "sole occupant" of the residence, in 1989, Wanda secretly moved in, thereafter marrying Elvis and never paying rent.

LaVerne is afraid of Elvis, who threatened her with a loaded shotgun in 1991. Therefore, LaVerne was afraid to take legal action against Elvis.

In 1994, LaVerne "[f]ound out that Elvis had remarried and was occupying the subject property with [Wanda]." LaVerne requested that he immediately vacate the property and free it to be rented for its fair market value. Elvis refused. In 1995, Elvis unilaterally recorded a quitclaim deed severing any remaining joint tenancy with LaVerne. (Civ. Code, § 683.2.)

In January 2002, LaVerne contacted Elvis to request negotiations regarding refinancing the property which, at that time, had an estimated value of $180,000 in equity. Elvis agreed to refinance and, in February or March 2002, Elvis and Wanda filed a refinance application without discussing with LaVerne whether she wanted to sell her interest. In May 2002, LaVerne signed the interspousal transfer to sell her interest to Elvis. A few days later, she cancelled the sale. Elvis then refused to refinance the debt with LaVerne, no matter how much lower an interest rate they could obtain by refinancing.

LaVerne alleges Elvis and Wanda owe her $100,500 as rental income for her 50 percent interest in the property, plus interest on that sum. Elvis has refused to account for Wanda's occupancy or to negotiate with LaVerne since 1989. On January 14, 2003, Elvis's attorney sent a letter to LaVerne, expressing his view that Elvis's "sole occupancy right extends to any other person (such as his wife) whom he elects to allow to reside with him," that the "residence is currently held by each of you as tenants in common," and that the parties had agreed to specified possessory rights or arrangements. In this letter, Elvis offered to purchase LaVerne's one-half interest in the property for the net sum of $90,000 without deduction or offset, forgive the $8,000 obligation set forth in the Marital Settlement Agreement, and forgo seeking any offset for improvements or repairs made by him or for his having paid federal and state tax liens previously levied against LaVerne's interest. He advised LaVerne that she could seek to refinance her undivided 50 percent interest in the property, but she would be solely liable to repay that loan. The letter also disclosed that Elvis "does not intend to move from Shaw Street nor sell the property . . . ."

LaVerne attempted to state causes of action for *conspiracy* against Elvis and Wanda (first cause of action), *fraud* against Elvis alone (second cause of action), *unjust enrichment* against Wanda and Elvis (third cause of action), *constructive fraud* against Elvis (fifth cause of action), *breach of a confidential relationship* and for imposition of a constructive trust against Elvis (sixth cause of action) and a claim for *breach of fiduciary duty* against Elvis, styled "petition to establish spousal claim to community estate, obtain

accounting of community property, [and] recover damages for breach of fiduciary duty" (fourth cause of action).

The second amended complaint sought damages, including: restitution and damages of $600 per month for unlawful rental from January 1990 to January 2004, for a total of $100,500; forfeiture of Elvis's interest in the property; an order that Elvis and Wanda vacate the property; compensatory, exemplary and punitive damages to be determined; injunctive relief barring Elvis or Wanda from vandalizing the property or from stopping payment of the mortgage obligation until transfer or vacation of the property; interest; and attorney fees and costs.

Discussion

As we have stated, "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) . . . . In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid*.) If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid*.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid*.) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid*.)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074,1081; accord, *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at pp. 1293-1294.) We are persuaded the trial court did not err in sustaining the demurrer in this case.

As the trial court recognized, the critical allegation in the complaint for purposes of application of the statute of limitations is LaVerne's concession in paragraph 66 of the second amended complaint that, "[i]n 1994, [she] found out that Elvis had remarried and was occupying the subject property with [Wanda]." This allegation is contained in the

sixth cause of action of LaVerne's complaint.[3] In her appellant's opening brief, "LaVerne admits that she found out Wanda was living in the house in late 1994" and that for the following nine years she begged Elvis to move.

"The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled." (*City of Vista v. Robert Thomas Securities, Inc*. (2000) 84 Cal.App.4th 882, 889.) LaVerne's discovery of Wanda's occupation of the property, nearly 10 years before initiating the instant action, bars those causes of action founded upon Wanda's occupation or Elvis's alleged deception regarding the sole occupancy promise. Consequently, the second, third, fifth and sixth causes of action would be barred under any or all of the following statutes of limitation in the Code of Civil Procedure, as those claims are premised upon the alleged wrongfulness of that conduct.

Section 335.1: "Within two years: An action for assault, battery, or injury to, . . . an individual caused by the wrongful act or neglect of another."

Section 337: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . ."

Section 338: "Within three years: [¶] . . . [¶] (b) An action for trespass upon or injury to real property. [¶] . . . [¶] (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Moreover, LaVerne's claims for fraud or fraud by a fiduciary are barred either by section 338, subdivision (d) or section 343. (See *City of Vista v. Robert Thomas Securities, Inc., supra,* 84 Cal.App.4th at p. 889.)

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[3] Respondents contend the original verified complaint and the first amended verified complaint both contained numerous references to the 1994 date of discovery. LaVerne has not secured copies of these previous complaints for our record.

The fourth cause of action is also based upon Wanda's occupancy of the property. It is styled: "PETITION TO ESTABLISH SPOUSAL CLAIM TO COMMUNITY ESTATE, OBTAIN ACCOUNTING OF COMMUNITY PROPERTY, RECOVER DAMAGES FOR BREACH OF FIDUCIARY DUTY (Breach of Fiduciary Duty v. Elvis Jones)" LaVerne alleges therein that Elvis breached his duty to her by intentionally failing to disclose his remarriage and Wanda's occupancy of the property in violation of Family Code sections 3808[4] and 1102, subdivision (a).[5] LaVerne seeks to collect damages for the fair market rental value of Wanda's use and enjoyment of the property pursuant to Family Code section 721, subdivision (b).[6] The trial court concluded, and we

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4 Family Code section 3808 provides: "Except as otherwise agreed to by the parties in writing, if the party awarded the deferred sale of home order remarries, or if there is otherwise a change in circumstances affecting the determinations made pursuant to section 3801 or 3802 or affecting the economic status of the parties or the children on which the award is based, a rebuttable presumption, affecting the burden of proof, is created that further deferral of the sale is no longer an equitable method of minimizing the adverse impact of the dissolution of marriage or legal separation of the parties on the children."

5 Family Code section 1102, subdivision (a), provides in relevant part: "[E]ither spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."

6 Family Code section 721, subdivision (b), provides in relevant part: "[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, . . . including, but not limited to, the following:

"(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

"(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended

agree, that the fourth cause of action was barred by Family Code section 1101, subdivision (d). Family Code section 1101, subdivision (a) provides in relevant part: "A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate." Subdivision (d) provides that "any action under subdivision (a) shall be commenced *within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred.*" (Italics added.) It is clear in the fourth cause of action that the transactions and events for which remedy is being sought are Elvis's alleged intentional deceptions and Wanda's occupancy. It is conceded that LaVerne had actual knowledge of this conduct in 1994.

Nor do the facts alleged indicate that "sheer economic duress or undue influence embedded in the fraud continued to hold the victim in place" so as to toll the statutes of limitations. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 788 (*Wyatt*), italics omitted.) LaVerne concedes in her opening brief that she "knew that a court action at that time [in late 1994] would more than likely result in a forced sale of the subject property, initiated by either Elvis or the court. LaVerne did not wish to sell her interest and could not afford to buy Elvis out, so she continued to try to negotiate with Elvis" and that she "could have acted sooner, but that would have resulted in the loss of her property through a forced sale initiated by Elvis or the court. . . . ." LaVerne's desire to avoid a forced sale of the property and her hope that the subject property would be a "long term investment and the foundation of her retirement plan" are insufficient to toll the statute of

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to impose a duty for either spouse to keep detailed books and records of community property transactions.

"(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

limitations. (See *Averbach v. Vnescheconombank* (N.D.Cal. 2003) 280 F.Supp.2d 945; *Wyatt, supra,* 24 Cal.3d at pp. 786-788.) *Wyatt* was a civil conspiracy action against a mortgage broker wherein the equities favored tolling of the statute where the defendants trapped the plaintiffs in a "financial treadmill" of additional fees and late charges wherein the plaintiffs had to continue to pay the fees or lose their homes and the "sheer economic duress or undue influence embedded in the fraud continue[d] to hold the victim in place." (*Wyatt,* at p. 788, italics omitted.) As observed in *Averbach v. Vnescheconombank,* at page 958, applying California law and denying tolling of the statute of limitations in a fraud case: "[I]n the instant case, however, Plaintiff was not so trapped; nothing prevented Plaintiff from filing suit to vindicate [her] rights after [she] was on inquiry notice regarding [the defendants'] alleged fraud. . . ."

LaVerne's first cause of action for conspiracy (the allegations of which are re-alleged and incorporated into subsequent causes of action) alleges the conspiracy between Wanda and Elvis to damage her was initiated before their marriage. She alleges Elvis lied to her during negotiations of the Marital Settlement Agreement by declaring he would live in the subject property as a single tenant, and that Wanda participated with Elvis to exclude LaVerne from the property. LaVerne argues here, as she did below, that the conspiracy cause of action tolled the statutes of limitation, as the "[t]he last overt act in furtherance of the on going conspiracy to defraud [her] was the letter of January 14, 2003, when Elvis . . . officially and in writing repudiated his trust and fiduciary obligation[s]," and refused to negotiate or participate in a refinance of the property with her, even though a refinance of the property was in the best interest of the community estate and of LaVerne.

LaVerne cites *Wyatt, supra,* 24 Cal.3d 773, 786-788, and this division's opinion in *Aaroe v. First American Title Ins. Co.* (1990) 222 Cal.App.3d 124, 128 (*Aaroe*), in support. Miller and Starr have summarized the rule arising from these two cases as follows: "When the cause of action is based upon a conspiracy to commit fraud, the limitations period is tolled until the commission of the last overt act pursuant to the conspiracy. [(*Wyatt, supra,* 24 Cal.3d 773.)] Therefore, when an action is based upon a

conspiracy to commit fraud, the three-year limitations period does not commence until either the discovery of the fraud or the last overt act of the fraudulent conspiracy, whichever is later. [(*Aaroe, supra,* 222 Cal.App.3d 124.)]" (12 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 34.103, p. 372.)[7]

LaVerne's argument immediately runs aground upon the claim that the January 14th letter from Elvis's attorney was the "last overt act" in a fraudulent conspiracy. The attorney's communication in aid of reaching a settlement before initiation of litigation was neither tortious nor wrongful. Indeed, it was privileged under Civil Code section 47.

As recognized by Witkin, "The law is clear . . . that a *privileged act* cannot be an overt act in furtherance of a civil conspiracy sufficient to toll the limitations period." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 516, p. 649.) In *Thompson v. California Fair Plan Assn.* (1990) 221 Cal.App.3d 760 (*Thompson*), the appellate court recognized that where an insurer's defense of suit was absolutely privileged under the predecessor to Civil Code section 47, subdivision (b), the defense of suit could not serve as the "last overt act" in a conspiracy, sufficient to revive an otherwise time-barred conspiracy claim. (*Thompson,* at p. 766.) The *Thompson* court pointed out the difference between civil and criminal conspiracy. "Civil conspiracy is not a tort but rather a theory of joint liability whereby all who cooperate in another's wrong may be held liable. [Citation.] In a civil case, liability attaches only for action taken pursuant to the conspiracy. [Citation.] In a criminal case, liability attaches for the agreement, not the overt acts, which need not be criminal in nature." (*Id.* at p. 767.) The *Thompson* court also observed that in *Wyatt, supra,* 24 Cal.3d 773, the defendants had continued to commit wrongful acts [in that case the last overt act was the wrongful collection of a loan payment] in furtherance of a conspiracy to harm the plaintiff. (*Thompson,* at p. 767.)

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[7] "Similarly, when liability is premised on a civil conspiracy the statute of limitations does not commence 'until the "last overt act" pursuant to the conspiracy has been completed.' (*Wyatt*[, *supra*,] 24 Cal.3d [at p.] 786; see *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1127.)" (*State ex rel. Harris v. Pricewaterhouse Coopers LLP* (2005) 125 Cal.App.4th 1219, 2005 Cal.App.Lexis 73, *115.)

In *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, we restated the following principles relating to whether a given communication was privileged under Civil Code section 47, subdivision (b): "It is clear that whether a given communication is within the privilege is an issue of law, and not fact. '[W]here the facts and circumstances under which a defamatory publication was made are undisputed, the question of privilege is a matter of law.' [Citations.]" (*Nguyen*, at p. 147.) Moreover, "the 'litigation privilege' applies to prelitigation communications as well as those occurring during the course of actual litigation." (*Ibid.,* citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1190-1193.) Where settlement offers are made in good faith in actual contemplation of litigation, the privilege afforded by Civil Code section 47, subdivision (b) is absolute. (See, e.g., *Rubin v. Green*, at pp. 1190, 1193.) Under California law, the privilege applies to communication with " 'some relation to a proceeding that is actually contemplated by . . . a possible party to the proceeding.' " (*Rubin v. Green,* at pp. 1194-1195, quoting *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 393.)

The January 14, 2003 letter could not serve as a last overt act in the alleged conspiracy to defraud LaVerne of her interest in the property. Whether the applicable statute of limitations is the three-year period of section 338, subdivision (d) for real estate fraud, or the four-year catch-all period of section 343, it ran long ago.

The judgment is affirmed. Respondents Elvis and Wanda are awarded their costs on this appeal.

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Kline, P.J.

We concur:

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Lambden, J.

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Ruvolo, J.